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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-676
Miscellaneous

THEODORE Q. CHILDS,

Petitioner,

against

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, MILTON MOLLEN, Presiding Justice, and FRANK D. O'CONNOR, LEON D. LAZER, FRANK A. GULOTTA and GUY J. MANGANO, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Respondents.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS

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Prefatory Statement

Respondents received petitioner's motion by mail on October 30, 1979. This Memorandum in Opposition is accordingly due November 29, 1979.

Respondents' arguments herein are addressed solely to the motion for leave to file a petition for a writ of man-

damus. Therefore, the underlying legal issues decided by the Court below are discussed only in such detail as is necessary for decision of the motion. Should leave to file a petition be granted, respondents pray additional briefs on the merits be permitted, pursuant to Rule 31(6) of the Rules of the Supreme Court.

Statement of Facts

On March 5, 1979, in *Orr* v. *Orr,* 440 U.S. 268 (1979), this Court held Alabama's alimony statutes invalid under equal protection for permitting awards only to wives after a financial fact-finding directed toward both spouses. Two weeks later, the Court remanded *Childs* v. *Childs,* 440 U.S. 952 (1979), to the Second Department of the Appellate Division of the Supreme Court of the State of New York "for further consideration in light of *Orr* v. *Orr*", *supra. Childs* involved an equal protection challenge to New York's Domestic Relations Law (DRL) § 237(b) which, literally read, authorizes counsel fee awards only to wives after a financial fact-finding directed to both husbands and wives.

On July 11, 1979, respondent Appellate Division rendered a decision in *Childs* on remand, 69 A D 2d 406 (1979), which upheld the constitutionality of DLR § 237(b) by reading it in tandem with other statutes and in accordance with legislative intent to permit the award of counsel fees in matrimonial actions to husbands as well as to wives. The order remitted the proceeding to the trial court for a hearing at which petitioner could apply for counsel fees. Petitioner instead filed a Notice of Appeal as of right under New York Civil Practice Law and Rules (CPLR) § 5601. On October 9, 1979, the Court of Appeals dismissed the appeal because it was from a non-final order.

Petitioner herein was the defendant in the original matrimonial action. He successfully petitioned for a writ of certiorari to this Court and was appellant in the case on remand to the New York Courts. His present motion seeks leave to file a mandamus petition, alleging that respondent Appellate Division failed to comply with this Court's mandate in *Childs.*

On November 6, 1979, subsequent to the docketing of this motion, petitioner moved in respondent Court for an order granting him leave to appeal to the Court of Appeals under CPLR § 5062(a)(1)(i) and/or § 5602(b)(1). As of this writing, said motion has not been decided.

POINT I

The motion should be denied because at the time it was filed, statutory methods of appeal were available to petitioner and because in fact, he subsequently has taken an appeal.

Petitioner has made a motion under CPLR § 5602 in respondent Appellate Division for leave to appeal to the New York Court of Appeals. If this motion is denied, he may still seek leave to appeal from the latter Court itself under the same statute. He may further seek review in this Court by appeal or writ of certiorari under 28 U.S.C. § 1257.

He may likewise appear for the hearing which has been ordered in trial court and apply for counsel fees. If denied, he may, as he did before, appeal all the way to this Court.

In *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 27-8, 32 (1943), this Court held that mandamus does not lie where:

> "a statutory method of appeal has been prescribed . . . [and the Court below] has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power."

Not even the burden and expense of undergoing a possibly unnecessary trial, much less a hearing as here, justifies mandamus without more. *Id.* at 30-31; *United States Alkali Export Assn., Inc.* v. *United States,* 325 U.S. 196, 202-3 (1945).

Petitioner attempts to find an abuse of jurisdiction by characterizing the Appellate Division's statutory interpretation in *Childs* as "judicial legislation" (Petitioner's Motion at 17-23). He relies on a series of cases delimiting proper uses of statutory interpretation and this Court's refusal in *Caban* v. *Mohammed,* 440 U.S. ——, 99 S. Ct. 1760 (1979), to save the constitutionality of New York's DRL § 111(1)(c) by reading that adoption consent statute to cover unwed fathers as well as unwed mothers of children.

But the cases he cites on statutory interpretation clearly show that courts may interpret statutes in the light of legislative intent in order to save their constitutionality. Certainly, this Court's many decisions approving the interpretation of comparable statutes to cover both sexes "suggest strongly" that such readings "are [not] clearly beyond the constitutional competence" of the courts. *Califano* v. *Westcott,* —— U.S. ——, —— S.Ct. ——, 47 USLW 4817, 4821 (June 25, 1979).

Respondents, of course, assert the correctness of their decision. But even if respondents erred in construing DRL § 237(b), that decision is reviewable by appeal, not by mandamus. As this Court held in *Ex parte Park Sq. Automobile Station,* 244 U.S. 412, 415 (1921), even if:

> "the error which the proposition attributes to the ruling below [as to 'the clearly erroneous construction of the statute'] is manifest, . . . where statutory methods of review of jurisdiction were provided for, they could not be disregarded, and therefore . . . there was no power to override the statutory provisions by resorting to the writ of mandamus."

Cf. *Panama Canal Co.* v. *Grace Lines, Inc.,* 356 U.S. 309, 318 (1958); *Work* v. *Rives,* 267 U.S. 132, 177, 183 (1925).

Caban presented a unique situation, quite different from the present one. It was before this Court on appeal, not by mandamus. The statute there in question had been authoritatively and recently interpreted by New York's highest court as inextricably embodying a sex-based classification. *Matter of Malpica-Orsini,* 36 N Y 2d 568 (1975), app. dsmd. *sub nom. Orsini* v. *Blasi,* 423 U.S. 1042 (1976). In view of that reading, there would have been no purpose in remanding *Caban* to see if the statute could be saved by another construction.

Here, however, petitioner seeks review of a court's statutory interpretation by mandamus while simultaneously pursuing his statutory avenues of appeal. Here the State's highest court has never ruled on the proper interpretation of the sex-based classification in the challenged statute. How it will rule on that statute, and indeed whether it will rule on it in the *Childs* case, cannot be foreseen with certainty. Under this Court's usual abstention rules, see *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), the State courts should be given an opportunity to construe their own statute before a Federal court rules on its proper interpretation. Cf. *Wold* v. *Wold,* —— F2d —— (7 Cir. Mar. 12, 1979), cert. den. —— U.S. ——, 48 LW 3219 (Oct. 1, 1979). The final ruling of the Court of Appeals, or its refusal to rule until petitioner complies with the mandate for a new hearing, can be reviewed

> "by the exercise by this Court of its power to issue a writ of certiorari in a proper case [.T]here is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose." *Ex parte Park Sq. Automobile Station, supra,* 244 U.S. at 414.

POINT II

The motion should be denied because petitioner has not met his burden of showing that his right to issuance of the writ is "clear and indisputable."

Even if this motion were not barred by the pendency of an appeal, see Point I *supra,* petitioner has not met his burden of showing enough merit to warrant granting the motion, much less the petition.

In *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976), this Court held that:

> "the party seeking issuance of the writ . . . [of mandamus must] satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."' *Bankers Life & Cas. Co.* v. *Holland,* [346 U.S. 379], at 384 [1953], quoting *United States* v. *Duell,* 172 U.S. 576, 582 (1899); *Will* v. *United States,* [389 U.S. 90], at 96 [1967]."

Petitioner seeks to carry his burden by arguing, first, that this Court remanded *Childs* solely for legislative action, barring the Courts below from judicial interpretation (Petitioner's Motion at 15-17). Second, he argues that New York courts may not change the statutory scheme of the State's matrimonial laws (*id.* at 17). Finally, he asserts that the interpretation given the statute by respondents is clearly incorrect (*id.* at 20-22).

Petitioner's first argument does not explain away the clear language of the order remanding *Childs* "for further consideration in light of *Orr* v. *Orr,*" *supra.* Nothing in the order on remand barred the New York courts from exercising their usual powers to construe statutes so as to preserve their constitutionality. See p. 4, *supra.*

Nor is there anything in *Orr* which suggests that State Courts were barred from judicial interpretation of matrimonial statutes to comply with equal protection. While this Court noted that the Alabama courts had interpreted their statutory scheme to bar a gender-neutral reading, 440 U.S. at 270 n. 1, and suggested that legislative action might be necessary, *id.* at 272, in the same paragraph it cited with approval *Stanton* v. *Stanton* (I), 421 U.S. 7 (1975). On its second hearing of the *Stanton* case, this Court specifically interpreted its first decision to require the Utah Supreme Court to apply its statute in a gender-neutral manner. The *Stanton* (II) Court suggested "that the Utah Court legitimately might" reinterpret its statute in the light of the common law or take note of legislative intent as shown by recent Utah laws creating a gender-neutral age of majority. *Id.,* 429 U.S. 501, 504 n. 4* (1977).

The decisions in *Childs* and *Orr* thus in no way suggest that judicial interpretation of matrimonial statutes as gender-neutral in order to satisfy equal protection is an abuse of judicial power. Indeed, the precedents of *Stanton* and *Califano* v. *Westcott, supra,* show that this Court has approved such readings, even where it might be necessary to overrule prior decisions.

As to petitioner's second argument, claiming that the New York courts may not reinterpret the statutory scheme of matrimonial laws as gender-neutral, this issue was briefed at length before respondent Appellate Division and was rejected on the merits, 69 A D 2d at 418-9. The careful treatment of that issue therein and the weighty authority with which the Appellate Division buttressed its finding of power to read the statute as gender-neutral are

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* Considering the case for the third time, the Utah Court interpreted its statute in light of subsequent amendments and read it to set a uniform age of majority for both sexes. *Stanton* v. *Stanton* (III), —— Utah 2d ——, 564 P. 2d 303 (1977).

sufficient to show that the Court was not clearly and indisputably wrong.

Notably, the New York Court of Appeals recently remanded an appeal involving similar statutes, FCA §§ 412, 438 (providing support and counsel fees for wives but not husbands), for a determination as to whether the laws' constitutionality could be preserved by statutory interpretation. *Roberts* v. *Roberts*, —— N Y 2d —— (September 6, 1979). While the order was on jurisdictional grounds and cannot be said to presage how the Court will finally rule, it does show that respondents were not acting beyond their powers in their decision in *Childs*.

To the extent that petitioner has raised a serious claim under the State Constitution that New York's courts may not reinterpret matrimonial statutes (Petitioner's Motion at 17-18), this claim clearly was not passed upon in *Orr* or *Childs* and could not form a predicate for a mandamus to conform with those rulings. More importantly, the likelihood that this issue—which could involve a radical re-evaluation of New York's constitutional history, reaching back to the early 1600's, see Attorney General's Brief, Point II.C, *Childs* v. *Childs* (2d Dept)—would have to be confronted were the motion granted, and the certainty that this Court would abstain from passing upon it until the New York Court of Appeals did so, see p. 5 *supra*, are further reasons to deny the motion.

As to petitioner's third claim, that respondents' reading of the statute is incorrect, until the State's highest court has ruled on it, the answer to that question is uncertain. But the unanimity with which every other State court to face the issue has also read the laws as gender-neutral* at the least shows that respondents' reading was not clearly and indisputably wrong.

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* One trial court initially held DRL § 237 unconstitutional. It has since vacated that judgment in light of *Childs*.

Issuance of a writ of mandamus is a matter of the Court's "sound discretion sparingly exercised," Rule 30, even where the petitioner has shown his right to relief. Where, as here, petitioner's right to relief is neither clear nor indisputable, the motion for leave to file a petition should be denied.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied due to the existence of statutory methods of appeal, which petitioner is already pursuing, and due to his failure to show a "clear and indisputable" right to its issuance.

Dated: New York, New York
November 28, 1979

Respectfully submitted,

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